

## Environment - Denmark

Damages for loss of value due to the erection of wind turbines

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### Introduction

In a number of recent decisions on the erection of large demonstration wind turbines, the Appraisal Authority has awarded modest damages to adjoining properties, in accordance with the Promotion of Renewable Energy Act. However, in general the awarded damages have been relatively far from the individual neighbours' experience of the effects, in particular with respect to the new generation of wind turbines. As a result, local authorities may hesitate before granting permission for the establishment of new wind turbine parks.

### Environmental impact of wind energy sector

Concurrent with the implications of global warming - such as significant ice melt, changes in precipitation and an increase in the demand for energy - the exploitation of alternative and 'clean' energy sources tops the global energy agenda. In Denmark, the wind energy sector has drawn particular interest from both environmentalists and politicians. Danish wind turbine manufacturer Vestas leads the development and production of wind turbines worldwide.

While most citizens have no objections to the exploitation of environmentally sustainable energy sources, few are excited at the prospect of becoming a neighbour to the new, larger wind turbines, which often reach 150 metres in height and have a production capacity of more than 3 megawatts.

Close proximity to large wind turbines often results in inconvenience in terms of sound, shadow and view, irrespective of whether the public law requirements on distance and noise have been met. Adjoining properties may suffer a loss of value, making them difficult to sell. The societal wish to erect more and larger wind turbines has thus increasingly resulted in objections from neighbours.

### Law relating to adjoining properties

In a recent decision, the Supreme Court established that the Danish law relating to adjoining properties, as developed through case law, can be applied to the development of wind turbines.<sup>(1)</sup>

Under the law, a landowner may not exercise control of its property in such a way that the owner (or the lessee) of the adjoining property is prevented from or restricted in exercising control of the adjoining property. The law aims to ensure that the exercise of ownership of a property is subject to respect for other people's property.

In principle, any inconvenience (eg, damage, smell, noise, light, shadow, dust, smoke, a deteriorated view, tremors or traffic) may be contested under the law. However, for the law to be enforced the 'tolerance limit' must have been exceeded. This limit is typically phrased to imply that the inconvenience must exceed "what can reasonably be assumed to be part of the common social development in the area".

### Promotion of Renewable Energy Act

The Promotion of Renewable Energy Act,<sup>(2)</sup> which came into force on January 1 2009, aims to:

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- promote the production of energy through the exploitation of renewable energy sources in accordance with climate, environmental and socio-economic considerations;
- reduce the dependence on fossil fuels;
- ensure energy security; and
- reduce carbon dioxide and other greenhouse gas emissions.

The act implemented, among other things, the adopted directives of the European Union's climate energy legislative package of April 6 2009 (including Directive 2009/28/EC), under which the member states undertook a legal obligation to increase the share of energy from renewable sources to 30% of their total energy consumption by 2020.

In addition to the act, rules were adopted on, among other things, damages for loss of property value due to the erection of wind turbines. Under these rules damages must be fixed in accordance with the general law of damages in such a way that the full loss of value is compensated. However, the loss must be more than 1%.<sup>(3)</sup> The loss of value scheme thereby differs from the rules of the law relating to adjoining properties, under which damages can be awarded only for inconveniences that exceed the tolerance limit. As such, the law relating to adjoining properties has, to a certain extent, become superfluous in relation to inconvenience from wind turbines.

In the legislative history behind the act, individual estimates have been made based on specific local conditions. Regard is thereby paid to:

- the nature of the area;
- housing prices in the area;
- whether wind turbines have already been erected in the area;
- whether there are other plants in the area;
- the distance of the wind turbine to the buildings;
- the height of the wind turbine; and
- any anticipated inconveniences associated with the turbine.

Any person whose property value has been reduced as a result of the erection of wind turbines is entitled to receive damages. However, the only neighbour that can be compensated is the owner of the property - other neighbours (eg, lessees) are not entitled to compensation, in contrast to the ordinary law relating to adjoining properties. There is no geographical limitation on compensation. The loss is fixed by the Appraisal Authority.

### **Case law**

In early 2011, in the case concerning Kappel Vindmøllepark in southern Denmark, the authority fixed the damages for more than 50 adjoining properties in connection with the erection of new demonstration wind turbines in the park. The erection involved seven wind turbines, including four turbines with a maximum total height of 160 metres, two turbines with a maximum total height of 175 metres and one turbine with a maximum total height of 200 metres, and two warning light masts of 200 metres.

Despite the total loss of value amounting to around Dkr3.5 million, the loss of value of the individual properties mostly amounted only to between Dkr50,000 and Dkr150,000. Such amounts are typically not paid out, as the loss of value does not exceed 1% of the total value of the property.

### **Comment**

Based on the recent practice of the Appraisal Authority, the level of damages under the loss of value scheme of the Promotion of Renewable Energy Act has been modest. However, there are a few decisions in which the loss of value has been specifically fixed at more than 10%. The prospect of having to pay damages should not in itself restrain wind turbine manufacturers from establishing new wind turbine parks.

At the same time, the level of damages in general is not commensurate with individual citizens' experience of the inconvenience associated with becoming a neighbour to the next generation of wind turbines. Local authorities may therefore hesitate before granting permission for the establishment of new wind turbine parks.

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### **Endnotes**

(1) Reported in UfR 2009.2680H. In this case, no damages were awarded.

(2) See Promotion of Renewable Energy Act (1392), December 27 2008.

(3) See Section 6 of the act.

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